Supreme Court, U.S.
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No. 04-_____

In The

Supreme Court of the United States

DAVID G. STERN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the holdings in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004), apply to the Federal Sentencing Guidelines?

Whether a sentence that was enhanced on the basis of aggravating factors not charged in the indictment, presented to the jury, and found beyond a reasonable doubt must be reduced to the maximum sentence that could have been imposed under the guidelines without such aggravating factors?

Whether a judgment of conviction must be vacated and a judgment of acquittal entered where all the elements of the offense were not charged in the indictment, presented to the jury, and found beyond a reasonable doubt?

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PETITION FOR A WRIT OF CERTIORARI

David G. Stern petitions for a writ of certiorari to the United States Court of Appeals for the First Circuit, requesting review of the Judgment entered by the court on February 19, 2004.

OPINIONS BELOW

The Judgment of the United States Court of Appeals for the First Circuit entered on February 19, 2004, is unpublished and is reproduced at App. 1-4. The Order of the Court of Appeals for the First Circuit entered on April 22, 2004, denying Stern's Petition for Rehearing and En Banc Determination is unpublished and is reproduced at App. 16-17. The Judgment of the District Court of the District of Massachusetts entered on October 1, 2002, is unpublished and is reproduced at App. 7-15. The Order of the Court of Appeals for the First Circuit entered on August 16, 2004, denying Motion to Recall Mandate is unpublished and is reproduced at App. 5-6.

STATEMENT OF JURISDICTION

The Court of Appeals for the First Circuit entered Judgment on February 19, 2004. App. 1-4. Stern timely petitioned for rehearing and en banc determination. The Court of Appeals for the First Circuit issued its Order denying Petitioner's Petition for Rehearing and En Banc Determination on April 22, 2004. App. 16-17. Petitioner applied for and on July 7, 2004, received from Justice Souter an extension of time "to and including September 19, 2004," within which to file his petition for writ of

certiorari. App. 18. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law. . . ."

18 U.S.C. § 3553 (Imposition of a Sentence), together with the United States Sentencing Guidelines promulgated thereunder.

STATEMENT OF THE CASE

Petitioner, David G. Stern, was charged in an Indictment in the United States District Court for the District of Massachusetts on July 18, 2001, with 16 counts of mail fraud in violation of 18 U.S.C. § 1341 and 2 counts of wire fraud in violation of 18 U.S.C. § 1343. App. 7 (District Court Judgment in a Criminal Case). A jury trial was held on April 1-4, 2002, before the Honorable Nancy Gertner, United States District Judge. Over Stern's objections, in which he cited *Apprendi v. New Jersey*, 530 U.S. 466

(2000), the district court refused to include on the jury verdict form the amount of the alleged loss. App. 22-25 (Transcript, April 4, 2002). Stern was found guilty of counts 1-14, 16, 17, and 18, but acquitted of count 15. App. 7 (District Court Judgment in a Criminal Case). Stern was neither fined nor ordered to pay restitution. App. 14. On September 25, 2002, Stern was sentenced by the district court to a term of imprisonment of 30 months, plus 3 years supervised release. App. 9, 10. In calculating Stern's sentence, the district court *enhanced* the base offense level under U.S.S.G. § 2F1.1(a) of 6 points by 13 points: 2 points under U.S.S.G. § 2F1.1(b)(2)(A) for more than minimal planning; 2 points under U.S.S.G. § 3B1.3 for fiduciary relationship; and 9 points under U.S.S.G. § 2F1.1(b)(1)(J) for a loss of $450,000. A. 20-21 (Presentence Report Offense Level Computation). See also App. 14-15 (District Court Judgment in a Criminal Case).

None of the enhancements, which resulted in the 13-point increase on the Sentencing Table, were charged in the indictment, presented to the jury, or found beyond a reasonable doubt. The district court noted on the Judgment of Conviction that Restitution was "N/A" – not applicable. A. 14. The district court did so because the amount used in the calculation of loss had been repaid by Stern to the "victim," with interest, over **2½ years before** the issuance of the criminal indictment. The resulting enhancements increased Stern's sentence from a range of 0-6 months (level 6) to 30-37 months (level 19), plus the corresponding increase in supervised release.

The Judgment of Conviction entered on October 1, 2002. A. 7-15. Stern filed a timely Notice of Appeal in the First Circuit Court of Appeals on October 4, 2002. On January 6, 2003, Stern self-surrendered to the Federal

Medical Center-Devens, Ayer, Massachusetts, where he remains incarcerated.

In his appeal, Stern presented to the Court of Appeals the following issue:

> "WHETHER THE DISTRICT COURT WAS DEPRIVED OF JURISDICTION TO SENTENCE STERN WHERE ALL OF THE ELEMENTS OF THE OFFENSES WERE NOT INCLUDED IN THE INDICTMENT OR PRESENTED TO THE TRIER OF FACT OR FOUND AT TRIAL BY THE CONSTITUTIONAL STANDARD OF BEYOND A REASONABLE DOUBT, AS REQUIRED UNDER *APPRENDI V. NEW JERSEY*, 530 US 466 (2000)?"

Stern set forth several sub-arguments including his assertion that:

> "THE DISTRICT COURT ERRED BY INCREASING THE MAXIMUM PUNISHMENT THAT STERN FACED BASED ON FACTS NOT CHARGED IN THE INDICTMENT NOR FOUND BEYOND A REASONABLE DOUBT BY THE TRIER OF FACT."

On February 19, 2004, the Court of Appeals for the First Circuit entered a Judgment affirming the Judgment of the lower court, saying in relevant part:

> Stern acknowledges that this court has already rejected his argument invoking *Apprendi v. New Jersey*, 530 U.S. 466 (2000). "*Apprendi* simply does not apply to guideline findings that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest applicable statutory maximum." *United States v. Caba*, 241 F.3d 98, 101 (1st Cir. 2001). "Nothing in *Apprendi*

> or [other] cases" – including *Ring v. Arizona*, 536 U.S. 291 (2002), the grant of certiorari in *Blakely v. Washington*, 124 S.Ct. 429 (Oct. 20, 2003), and *United States v. R.L.C.*, 503 U.S. 291 (1992), the trio of cases cited by Stern – "calls into question the validity of the Sentencing Guidelines." *United States v. Goodine*, 326 F.3d 26, 33 (1st Cir. 2003), *pet. for cert. filed* (Oct. 16, 2003). *For the present we have no reason to think that Apprendi will be applied to the federal guidelines.*

App. 1-2 (emphasis added).

On March 25, 2004, Stern filed a Petition for Panel Rehearing and for En Banc Determination, which was denied on April 22, 2004. App. 16-17. Stern's Petition for Writ of Certiorari was originally due on July 22, 2004, but an extension of time within which to file the petition was granted by Justice Souter on July 7, 2004, to and including September 19, 2004. A. 18.

REASONS FOR GRANTING THE WRIT

The primary reason for granting Petitioner's Writ of Certiorari is to clarify at least three questions which have surfaced in the aftermath of the Court's decision in *Blakely v. Washington*. The need for such clarification is apparent whether in this case or in the numerous "companion" cases before the Court. Specifically, the three questions involve:

1. The application of *Apprendi* and *Blakely* to the federal sentencing guidelines;

2. The effect of *Blakely* on post-*Apprendi* but pre-*Blakely* cases that are still in direct appeal or review, which have been tried and

for which the defendant was sentenced based on aggravating factors not charged, submitted to the jury, or found beyond a reasonable doubt; and

3. Whether a judgment of conviction must be vacated where all the elements of an offense are not charged, submitted to the jury, or found beyond a reasonable doubt.

Petitioner has exhausted every means available to him to bring these issues before the Court of Appeals for the First Circuit, whose reluctance to address these questions creates further chaos in an already chaos-pocked landscape.

Courts of Appeal are divided over these issues, have refused to rule on them, or, as in the case at bar, have rendered a decision in contravention of this Court's precedents. District courts are also without guidance and inconsistent rulings are being issued almost daily.

A. The Questions Presented are of Great Importance.

According to the statistics cited by Justice O'Connor in her dissent in *Blakely* at footnote 2, as of March 31, 2004, there were in excess of 8,000 federal criminal appeals pending in which sentencing is an issue and since *Apprendi* was decided over a quarter of a million defendants have been sentenced in federal courts, most if not all of which are governed by the Federal Sentencing Guidelines. *Blakely v. Washington*, 542 U.S. ___, ___ n.2, 124 S.Ct. 2531, 2549 n.2 (2004). The sweeping impact that *Blakely* has already had and will continue to have upon sentencing in general and federal sentencing in particular

calls upon this Court to resolve whether the Court's "commitment to *Apprendi*," *Blakely*, 124 S.Ct. at 2538, extends to the Federal Sentencing Guidelines. *See* 124 S.Ct. at 2538 n.9 (majority opinion, disclaiming any opinion on the impact of the *Blakely* ruling on the Federal Guidelines). The ambiguity and resulting conflicts that are arising each day, challenge the Court to clarify its position, lest there be any remaining confusion. Stern asserts that the constitutional analysis set forth in the majority opinion should leave no doubt that *Apprendi* as amplified by *Blakely* applies to the Federal Sentencing Guidelines. Unfortunately, circuit courts have held otherwise and a conflict exists between the holdings of the Supreme Court and those of some of the lower courts. *See Blakely*, 124 S.Ct. at 2547 n.2 (O'Connor, J, dissenting); *see also* Motion to Reconsider Order of Court, at 1 n.1, App. 35 (citing cases).

The questions presented are of great importance to the administration of criminal justice through both state and federal systems and will affect literally thousands of cases, now and in the future.

B. This Case Is an Excellent Vehicle for Considering the Questions Presented.

This case presents an excellent vehicle to resolve three major "open" issues resulting from the holding in *Blakely*: the application of the requirements espoused by the Court to the Federal Sentencing Guidelines; the manner of adjusting impermissibly enhanced sentences; and the effect upon a conviction if all of the elements of an offense are not charged in the indictment, presented to the jury, and proven beyond reasonable doubt.

Petitioner Stern respectfully suggests that this Court should grant certiorari and hold that *Apprendi* as clarified by *Blakely* is to be applied to the Federal Sentencing Guidelines; that any sentence enhanced as a result of aggravating factors not charged in the indictment, presented to the jury, and found beyond a reasonable doubt must be reduced to the maximum sentence that could have been imposed without such aggravating factors; and that a judgment of conviction must be vacated and a judgment of acquittal entered unless each and every element of an offense is charged in the indictment, presented to the jury, and found by the constitutional standard of beyond a reasonable doubt. Petitioner avows that the foregoing results are required by the Constitution of the United States and application of this Court's holdings in both *Apprendi* and *Blakely*.

The facts in the instant case are relatively simple. The *Apprendi* issue was framed and resolved, albeit unsuccessfully, in a concise fashion at trial. The Judgment of the Court of Appeals for the First Circuit is succinct in its rejection of *Apprendi*. There is no retroactivity or other procedural impediment. The *Apprendi* violation is not harmless. And this case implicates the core concern of *Apprendi* and *Blakely*. Accordingly, this case is an excellent vehicle for considering the questions presented.

ARGUMENT

A. THE HOLDINGS IN *APPRENDI* AND *BLAKELY* APPLY TO THE FEDERAL SENTENCING GUIDELINES.

The first question posed and answered by the Petitioner is somewhat narrow in its application, necessitated by the First Circuit's Order stating that "[f]or the present we have no reason to think that *Apprendi* will be applied to the federal guidelines." App. 2. A broader and more dispositive question would be whether *Apprendi* and *Blakely* apply to any "sentencing procedure [that] did not comply with the Sixth Amendment." *Blakely*, 124 S.Ct. at 2538. For it to be argued in the wake of cases that have followed *Blakely*[1] that footnote 9 somehow gives credibility to the argument that the majority did not intend to reaffirm its "commitment to *Apprendi* in this context reflect[ing] not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial," *id.*, simply ignores the underlying basis of the Court's reasoning.

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[1] *United States v. Ameline*, 327 F.3d 967 (9th Cir. 2004); *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004), *cert. granted*, No. 04-104, 2004 LEXIS 4788 (Aug. 2, 2004); *United States v. Mooney*, No. 02-3388, 2004 U.S. App. LEXIS 15300 (8th Cir. July 23, 2004), *vacated on grant of reh'g en banc*, 2004 U.S. App. LEXIS 16302 (8th Cir. Aug. 6, 2004); *United States v. Montgomery*, No. 03-5256, 2004 U.S. App. LEXIS 14384 (6th Cir. July 14, 2004), *vacated on grant of reh'g en banc*, 2004 U.S. App. LEXIS 15017 (6th Cir. July 19, 2004), *appeal dismissed*, 2004 U.S. App. LEXIS 15648 (6th Cir. July 23, 2004); *United States v. Ohlinger*, 377 F.3d 785 (7th Cir. 2004); *United States v. Penaranda*, 375 F.3d 238 (2nd Cir. 2004) (certifying question of *Blakely*'s application to the Supreme Court); *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004).

The Solicitor General in his amicus brief filed in *Blakely* was keenly aware of the finely woven chain between the sentencing scheme in *Blakely* and that of the U.S.S.G. saying that "[t]here are possible distinctions between federal guideline and state statutory systems . . . [b]ut it is uncertain whether those distinctions would be sufficient if this Court applied *Apprendi* [in *Blakely*]." 2002 U.S. Briefs 1632 at page 4.

It is no wonder the Solicitor General expressed concern, for the Court did find that the "right [to a jury trial] is no mere procedural formality, but a fundamental reservation of power in our constitutional structure," *Blakely*, 124 S.Ct. at 2538-39. That structure, Petitioner asserts, applies to any determinate sentencing scheme, including the federal guidelines.

The application of the *Apprendi-Blakely* principles to the federal guidelines (as well as any other determinate system) cannot be left in doubt after Justice Scalia, writing for the majority in *Blakely*, says "This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." 124 S.Ct. at 2540.

The *Blakely* majority focuses on the application of *Apprendi* in a practical sense, saying,

> In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow . . . the judge exceeds his proper authority.

124 S.Ct. at 2537 (emphasis in original). The *Blakely* majority thus effectively adopted Justice Thomas' impact test, espoused in his concurring opinion in *Apprendi*. 530 U.S. at 522.

Compare the First Circuit's Judgment in the instant case:

> "Apprendi simply does not apply to guideline findings that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest applicable statutory maximum." *United States v. Caba*, 241 F.3d 98, 101 (1st Cir. 2001).

App. 1-2.

It is ironic that Judge Gertner, Petitioner's trial judge, who in the colloquy quoted below gave rise to the pending Petition, wrote on July 26, 2004, in the case of *United States v. Mueffleman*, 327 F.Supp.2d 79, 2004 U.S. Dist. LEXIS 14114, at *30 (D. Mass. 2004), that "[i]f the issue is impact, the facts 'made essential' to sentencing, it does not matter who promulgated the 'guidelines' or standards or rules." At a sidebar conference held immediately prior to Stern's case being sent to the jury, the *Apprendi* issue was raised and resolved as follows (Mr. Hrones was defense counsel; Mr. Pineault was the Assistant United States Attorney prosecuting the case):

> SIDEBAR CONFERENCE:
>
> MR. HRONES: Your Honor, it just struck me that I should make an *Apprendi* objection now, because the loss, if he's convicted, it's going to be a question of the amount of loss.
>
> THE COURT: Right.

> MR. HRONES: That's a jury question under *Apprendi*.
>
> THE COURT: Uh-huh.
>
> MR. HRONES: And as to the basic offense like six months, but it can be kicked up to years in prison based on the loss. So it's my position that the jury should be – has to determine loss in this case.
>
> THE COURT: Mr. Pineault?
>
> MR. HRONES: I'd also object to the fact that they don't have the loss amount in the indictment. In other words, because he didn't indict on that the most – I mean, the loss cannot figure into the sentence in any way, so the maximum he can get is six months.
>
> MR. PINEAULT: I disagree, Your Honor. The loss computation is to be performed pursuant to the sentencing guidelines by the Court. . . .

Trial transcript, April 4, 2002, page 250, lines 2-21; App. 23.

The Court, at first, recognized the legal merit of Petitioner's position, saying:

> THE COURT: I know you're trying to put it on the record, but I will give you the opportunity, if you think the jury slip should have loss on it, I'll give you the opportunity to put that on the jury slip.

Id., page 251, lines 12-15; App. 24. However, the Court, upon reflection, acknowledged concern with the adequacy of the government's case, asking Assistant United States Attorney Pineault:

THE COURT: Total amount of loss, did you, in fact include testimony of the total amount?

MR. PINEAULT: Your Honor, I don't think we should go down this road.

THE COURT: I agree.

MR. PINEAULT: Because that may get into the issue of how you define a loss.

THE COURT: And how you define payment. Okay, we'll leave it as it is. Anything else Mr. Hrones?

MR. HRONES: No, Your Honor.

MR. PINEAULT: Nothing from the Government, Your Honor.

THE COURT: Okay.

Id., page 252, lines 7-21; App. 25.

Stern repaid any amounts at issue, plus interest, 2½ years prior to the commencement of criminal process. There can be no question that, although "[a]s *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to the jury all facts legally essential to the punishment," *Blakely*, 124 S.Ct. at 2543, the Petitioner was not so protected.

Justice O'Connor's dissent in *Blakely* is directed to the obvious conclusion that "Washington's sentencing system is by no means unique. Numerous other states have enacted guideline systems, as has the Federal Government." *Id.*, 124 S.Ct. at 2548. She goes on to say "[t]oday's decision casts constitutional doubt over" all guideline systems. *Id.*, 124 S.Ct. at 2549. Making the case for the

application of *Apprendi-Blakely* to the U.S.S.G., Justice O'Connor exclaims that "[i]t is no answer to say that today's opinion impacts only Washington's scheme and not others, such as, for example, the Federal Sentencing Guidelines. . . . The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the majority's reasoning. The Guidelines have the force of law, . . . , and Congress has unfettered control to reject or accept any guideline. . . ." *Id.*, 124 S.Ct. at 2549.

Immediately after this Court's decision in *Blakely*, Stern filed a Motion to Recall Mandate, arguing that this Court had, by virtue of its decision, "nullifie[d] the effect of the Court [of Appeal]'s reliance upon *United States v. Caba*. . . ." App. 31. The motion was denied. App. 5-6.

To date, five courts of appeal have weighed in on the issue of *Apprendi-Blakely*'s application to the federal guidelines. Four circuits (the 6th-*Montgomery*; the 7th-*Booker* and *Ohlinger*; the 8th-*Mooney*; and 11th-*Ameline*) have sided with the position urged by the Petitioner, that *Blakely* applies to the U.S.S.G.; one circuit, the 5th, in *United States v. Pineiro*, 377 F.3d 464, 2004 U.S. App. LEXIS 14259 (5th Cir. 2004), held that *Blakely* does not apply to the federal guidelines. However, in doing so, the court wavered: "In writing these words we are more aware than usual of the potential transience of our decision. We trust that the question presented in cases like this one will soon receive a more definitive answer from the Supreme Court, which can resolve the current state of flux and uncertainty. . . ." 2004 U.S. App. LEXIS 14259, at *27.

Contrast that with the 7th circuit's holding in *Booker*:

> [I]t is hard to believe that the fact that the guidelines are promulgated by the U.S. Sentencing Commission rather than by a legislature can make a difference. The Commission is exercising power delegated to it by Congress, and if a legislature cannot evade what the Supreme Court deems the commands of the Constitution by a multistage sentencing scheme neither, it seems plain, can a regulatory agency.

United States v. Booker, 375 F.3d 508, 511 (7th Cir. 2004), *cert. granted*, No. 04-104, 2004 LEXIS 4788 (Aug. 2, 2004).

In addition to the various courts of appeal that have addressed the application to the U.S.S.G. of the principles and protections set forth in *Apprendi-Blakely*, at least a dozen district courts have issued extensive Orders relating to the issue raised herein.[2] While the resolution the courts reach may differ, they are uniform in the application of *Blakely* and, consequently, the Sixth Amendment of the

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[2] *United States v. King*, No. 6-04-CR-35, 2004 U.S. Dist. LEXIS (M.D. Fla. July 19, 2004); *United States v. Einstman*, 325 F.Supp.2d 373 (S.D. N.Y. 2004); *United States v. Leach*, 325 F.Supp.2d 557 (E.D. Pa. 2004); *United States v. Toro*, No. 03-CR-362, 2004 U.S. Dist. LEXIS 12783 (D. Conn. July 8, 2004); *United States v. Croxford*, 324 F.Supp.2d 1230 (D. Utah 2004); *United States v. Medas*, 323 F.Supp.2d 436 (E.D. N.Y. 2004); *United States v. Shamblin*, 323 F.Supp.2d 757 (S.D. W.Va. 2004); *United States v. Watson*, CR-03-0146 (D.D.C. June 30, 2004); *United States v. Fanfan*, No. 03-47-P-H (D.Me. June 28, 2004), *cert. granted*, No. 04-105, 2004 LEXIS 4789 (Aug. 2, 2004); *United States v. Mueffleman*, 327 F.Supp.2d 79, 2004 U.S. Dist. LEXIS 14114 (D. Mass. 2004); *United States v. Lagiglio*, No. 01-CR-348-7, 2004 U.S. Dist. LEXIS 14611 (N.D. Ill. July 29, 2004); *United States v. Leach*, No. 03-CR-114-H (N.D. Okla. filed Aug. 13, 2004).

Constitution of the United States, to federal sentencing guidelines.

B. A SENTENCE THAT WAS ENHANCED ON THE BASIS OF AGGRAVATING FACTORS NOT CHARGED IN THE INDICTMENT, PRESENTED TO THE JURY, AND FOUND BEYOND A REASONABLE DOUBT MUST BE REDUCED TO THE MAXIMUM SENTENCE THAT COULD HAVE BEEN IMPOSED UNDER THE GUIDELINES WITHOUT SUCH AGGRAVATING FACTORS.

Assuming that this Court holds, here or in another case, that *Blakely*, and by extension *Apprendi* and the Sixth Amendment protections thus guaranteed, indeed apply to the federal sentencing guidelines, the next question that Stern raises and urges the Court to address is not whether *Blakely* invalidates the U.S.S.G. in whole or in part, but rather, what happens to those defendants like Stern whose cases are still pending, who were tried and sentenced post-*Apprendi* but pre-*Blakely and* whose sentences were enhanced based on aggravating factors not charged, submitted to the jury, or found beyond a reasonable doubt? The Petitioner is intentionally avoiding the quagmire surrounding the issue of whether federal guidelines are constitutional for two reasons. The first is admittedly self-interest: the validity of all, some, or none of the U.S.S.G. is not relevant to Petitioner's argument. Secondly, on a more global basis, Petitioner asserts that this Court had already decided the constitutionality question when it held that *Blakely* "is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Blakely*, 124 S.Ct. at 2540.

While the group of cases encompassed by the question raised is finite, limited by the dates the decisions in *Apprendi* and *Blakely* were rendered, and further limited by those cases still pending, based on the statistics referenced by Justice O'Connor in her *Blakely* dissent at footnote 2, it is fair to assume that there are still a substantial number of cases that will be affected by the way in which Petitioner's "now what" question is resolved by the Court. Looking forward, the Court can craft any one of a number of ways sentencing will be determined while respecting the Sixth Amendment. But what about those cases where defendant's right to have a jury decide facts incident to sentencing has already been abridged? Petitioner respectfully suggests that in those cases, Humpty Dumpty cannot be put back together again. Those cases cannot be subject to constitutionally protected resentencing, nor can resentencing be effectuated from a practical perspective, either. The sentencing judge has already rendered a penalty decision based on less than a reasonable doubt standard and based on facts required to be submitted to the jury. Reconvening the same trial jury for resentencing in those cases is obviously impractical, if not functionally impossible. Even if possible, trial testimony may have been received years ago. Reconvening a new jury is not an answer since they will not have the benefit of all that went before. Furthermore, all cases in this group would have to be resentenced in a like manner or else another constitutional Pandora's box is opened. The only other solution envisioned would be to retry any defendant whose sentence was impermissibly enhanced.

Fortunately, the group of cases envisioned by this question, while meaningful, is not so large that it will create the kind of chaos threatened by *Apprendi-Blakely*

opponents, and it is getting smaller every day. However, until the Court resolves these constitutionally infirm sentences, liberty interests are being set aside and the principle that "a defendant is entitled to have a jury decide by proof beyond a reasonable doubt, every fact relevant to the determination of sentence" remains unfulfilled. *Apprendi*, 530 U.S. at 550 (O'Connor, J., dissenting).

In order to deal with the Gordian Knot tied by impermissible enhancements, the Court is urged to be guided by its holding that "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives *wholly* from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended." *Blakely*, 124 S.Ct. at 2539 (emphasis added).

Like an artichoke, the impermissible enhanced sentences must be stripped away leaf by leaf until such time as "the maximum he [the judge] may impose *without* any additional findings" is reached. *Id.*, 124 S.Ct. at 2537 (emphasis in original). In the present case, the maximum sentence the judge could have constitutionally imposed without such "additional findings" is 0-6 months (the base sentence of 6 points) rather than 30-37 months (the enhanced 19-point calculation) used to determine the Petitioner's sentence of 30 months, of which he has already served 20 (as of September 6, 2004).

In reaching a result similar to that urged by Petitioner here, District Judge Dorsey in *United States v. Toro*, No. 03-CR-362, 2004 U.S. Dist. LEXIS 12763, at *12 (D. Conn. July 8, 2004), adopted the second of three options set forth in *United States v. Croxford*, 324 F.Supp.2d 1230, 2004 U.S. Dist. LEXIS 12156, at *34 (D. Utah 2004), suggesting that " . . . the Court should continue to follow

the other sections of the Guidelines apart from the defective provisions. . . ." *Toro* at pages 7-8. Judge Dorsey held that "any enhancements based on facts not stipulated or admitted by Defendant or found by the jury will not be considered. . . ." "To depart upward based on facts not stipulated by a defendant or found by a jury violates the Sixth Amendment." 2004 U.S. dist. LEXIS 12156, at *14, *15. Judge Dorsey concluded that "[e]ven if the USSG were found to be unconstitutional in their entirety, this [the base sentence] would still be the resulting sentence." *Id.*, at *21.

In the post-*Blakely* environment, no clear "rule of thumb" has emerged with regard to adjusting the sentences of "post-*Apprendi* but pre-*Blakely*" cases where the sentences have been unconstitutionally enhanced. Such direction is immediately required from the Court to prevent inconsistent results and to grant relief to those defendants, including the Petitioner, whose liberty interests are being denied in those situations "[w]hen a judge inflicts punishment that the jury's verdict alone does not allow. . . ." *Blakely*, 124 S.Ct. at 2537.

C. A JUDGMENT OF CONVICTION MUST BE VACATED AND A JUDGMENT OF ACQUITTAL ENTERED WHERE ALL THE ELEMENTS OF THE OFFENSE WERE NOT CHARGED IN THE INDICTMENT, PRESENTED TO THE JURY, AND FOUND BEYOND A REASONABLE DOUBT.

The heading is posed in the affirmative, as a statement of basic law that requires the government to charge in an indictment, submit to the jury, and prove beyond a reasonable doubt all elements of the offense, including any elements that may be applied to enhance sentence. By this

affirmative statement of elemental law, the Petitioner respectfully urges the Court, through the writ of certiorari to be issued in this case, reaffirm its commitment not only to *Apprendi*, but to due process in those situations where the lower court has *not* afforded a defendant that basic protection.

The principle espoused is steeped in precedent that the Court's holding in *Blakely* has once again placed under a microscope. "As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove all facts legally essential to punishment." *Blakely*, 124 S.Ct. at 2543.

Compare the now-indisputable legal principle with what happened here. The critical question was put to the prosecutor:

> THE COURT: Total amount of loss, did you in fact include testimony of the total amount?
>
> MR. PINEAULT: Your Honor, I don't think we should go down that road.

Trial transcript, April 4, 2002, page 252, lines 7-10; App. 25.

The unambiguous holding of the Court means, the Petitioner asserts, exactly what it says. "'An accusation which lacks any particular fact which the law makes essential to punishment is . . . no accusation within the requirements of common law, and it is no accusation in reason,' 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872)." *Blakely*, 124 S.Ct. at 2536.

The constitutional pedigree of these protections is impeccable and is carefully traced by Justice Thomas in his concurring opinion in *Apprendi* when he writes: "Today's

decision, far from being a sharp break with the past, marks nothing more than a return to the *status quo ante* – the status quo that reflected the original meaning of the Fifth and Sixth Amendments." *Apprendi*, 530 U.S. at 519.

At the foundation of the principle, the Court in *United States v. Cruikshank* held:

> The object of the indictment is, first, to furnish the accused with such description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

92 U.S. 542, 558 (1876). Citing *Davis v. United States*, 160 U.S. 469, 488 (1885), the Court in *In Re Winship*, 397 U.S. 358, 364 (1970), held that under the Due Process Clause, a criminal defendant may only be convicted "upon proof beyond a reasonable doubt of *every fact* necessary to constitute the crime with which he is charged." (Emphasis added.)

It was the intention of the Due Process Clause to protect defendants from the imposition of unjust punishment by ensuring that they have notice and are afforded the opportunity to defend against a charge upon which the government will attempt to impose punishment. *Russell v. United States*, 369 U.S. 749, 763-64 (1962). Thus, if the government fails to include such facts in an indictment and does not prove those facts to a jury beyond a reasonable doubt, the conviction is constitutionally flawed.

This protection is especially important with respect to findings that would dramatically change the sentence that the defendant would face. *See Jones v. United States*, 526 U.S. 222, 223 (1999).

The Court affixed this burden once again in holding that the government must meet the reasonable-doubt standard whether such an increase in punishment is labeled a "sentencing enhancement" or an element of an aggravated crime. *Ring v. Arizona*, 536 U.S. 584 (2002). "The dispositive question . . . is one not of form, but of effect. If . . . an increase in a defendant's authorized punishment [is] contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." *Id.*, 536 U.S. at 602 (internal citations and quotations omitted).

Both Justice Thomas in his concurring opinion in *Apprendi* and Justice O'Connor in her dissenting opinion in *Blakely* look to *In Re Winship* to support the position that "facts that historically have been taken into account by sentencing judges to assess a sentence within a broad range . . . all must now be charged in an indictment and submitted to the jury." *Blakely*, 124 S.Ct. at 2546 (O'Connor, J., dissenting).

The Court in *Winship* explained:

> The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction.

397 U.S. at 363-64. Since a criminal conviction rests upon a jury determination that the defendant is guilty of *every* element of the offense with which he has been charged and proven beyond a reasonable doubt, does it not stand to reason that an indictment to be valid must set forth all facts so required, and, to comply with constitutional protections, must be submitted to the jury and found beyond a reasonable doubt? *See*, *United States v. Gaudin*, 515 U.S. 506, 510 (1995).

Even the government, in theory (although not in the practice as evidenced by the present case), acknowledges that "[t]he Constitution requires that a defendant's guilt of each and every element of a crime be found by a jury beyond a reasonable doubt." Brief for the United States as Amicus in *Blakely*, 2002 U.S. Briefs 1632, page 5 (citing *Gaudin*).

With all these constitutional guarantees in place, it would seem that a judgment of conviction must be vacated and a judgment of acquittal entered where all the elements of the offense were not charged in the indictment, presented to the jury, and found beyond a reasonable doubt.

In reaching this conclusion, the Petitioner suggests that prospectively there should be little or no need to vacate convictions provided that the government complies with basic Due Process requirements. In the instant case, since "under the majority's approach, any fact that increases the upper bound of a judge's sentencing discretion is an element of the offense," *Blakely*, 124 S.Ct. at 2546 (O'Connor, J., dissenting), the failure to charge in the indictment, submit to the jury, and have found beyond a reasonable doubt all such facts or elements, must by

application invalidate the conviction. *Id.*, 124 S.Ct. at 2548-49 (O'Connor, J., dissenting).

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Honorable Court grant the Petition for Writ for Certiorari.

Respectfully submitted,

DAVID G. STERN, *Pro se*
23799-038 Unit I (CAMP)
Federal Medical Center, Devens
P.O. Box 879
Ayer, MA 01432

APPENDIX

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MANDATE

United States Court of Appeals
For the First Circuit

No. 02-2289

UNITED STATES,

Appellee,

v.

DAVID G. STERN,

Defendant, Appellant.

Before

Boudin, *Chief Judge*,
Lipez and Howard, *Circuit Judges*.

JUDGMENT

Entered: February 19, 2004

Appellant David Stern moves for bail pending appeal. Because briefing is complete, we reach the merits of the appeal, *affirm* the judgment of the district court, and *deny* the motion for bail as moot. *See* 1st Cir. R. 27(c).

Stern acknowledges that this Court has already rejected his argument invoking *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). "*Apprendi* simply does not apply to guideline findings that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest

applicable statutory maximum." *United States* v. *Caba*, 241 F.3d 98, 101 (1st Cir. 2001). "Nothing in *Apprendi* or [other] cases" – including *Ring* v. *Arizona*, 536 U.S. 584 (2002), the grant of certiorari in *Blakely* v. *Washington*, 124 S.Ct. 429 (Oct. 20, 2003), and *United States* v. *R.L.C.*, 503 U.S. 291 (1992), the trio of cases cited by Stern – "calls into question the validity of the Sentencing Guidelines." *United States* v. *Goodine*, 326 F.3d 26, 33 (1st Cir. 2003), *pet. for cert. filed* (Oct. 16, 2003). For the present we have no reason to think that *Apprendi* will be applied to the federal guidelines.

We are unpersuaded by any of Stern's challenges to his sentence. Stern cultivated a position of trust that grew out of, but extended beyond, his formal representation of Dvorah Nagiel. Without that position (and the insider knowledge he gleaned from it), he could not have so easily convinced her to entrust him with half of her divorce settlement. Stern concealed the offense with tax counsel and promissory notes that he claimed would be honored by "any court in America." The district court supportably found that the "relationship of trust" between Stern and Nagiel "facilitated his commission of the offense."

The court also correctly calculated the amount of loss from Stern's scheme. "Loss is a proxy for the seriousness of the offense"; a loss of zero in this case would be "presumptively wrong" because "it does not even remotely approximate [Stern's] wrongdoing." *United States* v. *Parsons*, 141 F.3d 386, 392 (1st Cir. 1998). The court observed, and Stern does not seriously dispute, that he took his former client's money even as he was being disbarred for misappropriating funds from other clients. The loss determination would be justified even if Stern had intended to repay Nagiel.

Finally, we find the indictment and the evidence sufficient on all counts. The fourteen mailings of "interest" payments (Counts 1-14) were not "incidental to the scheme," as Stern argues. They were the secure hook that kept Nagiel invested. The evidence showed that Stern procured the gold certificate confirmation letter by calling Alan Sugar (Counts 16-17). The letter encouraged Nagiel to contact Sugar or Stern if she had questions. Thus, it was foreseeable to Stern that she might use the wires to remind Sugar of his representations (Count 18).

The one close question is whether Stern caused the fax charged in Count 18 to be sent "for the purpose of executing" his scheme, as the wire fraud statute requires. We find it significant that Nagiel contacted Sugar as the letter had counseled her to do; that the fax itself, as Stern notes, bespeaks no awareness of the fraud; and that she informed Stern of her efforts, giving him a final opportunity to put her fears to rest by having her slip the gold certificate "under [her] pillow." For the purposes of the scheme, it was better that she follow the instructions of the letter rather than go directly to the authorities "[A]lthough potentially dangerous to the continuation of defendant's . . . scheme," the fax "was still in furtherance of the scheme" in that it "engender[ed] . . . circumstances in which [Stern] could do [something] to forestall discovery." *United States* v. *Pietri Giraldi*, 864 F.2d 222, 226 (1st Cir. 1988). For these reasons, the fax is distinguishable, from other communications by victims, the overt purpose of which is to oppose the fraud. *See United States* v. *Castile*, 795 F.2d 1273, 1279 (6th Cir. 1986) ("To the extent that the insurance investigation tended to produce evidence of Castile's involvement [in arson], it conflicted with Castile's purpose and would not have furthered his

scheme."); *United States* v. *LaFerriere*, 546 F.2d 182, 186-87 (5th Cir. 1977) (where the "victim strongly suspected that he was victim of a fraud," the "only likely effect" of demand letter by his lawyer threatening suit "would be to further detection of the fraud or to deter its continuation").

We think it useful to observe that Count 18 is unquestionably a stretch and is barely sustainable. In this instance there is no reason to think that it makes any difference to the sentence and the appeal as to it would probably be moot but for the small monetary penalty imposed for each count of conviction. Also, there is at least some basis to argue about whether the defendant fully preserved all aspects of the objection to it now pressed on appeal. If the central case against Stern hung significantly upon this count, we would be far more hesitant to affirm summarily.

By the Court:

RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk.

[Cert. Copies to Hon. Nancy Gertner and Tony Anastas, Clerk, United States District Court for the District of Massachusetts]

[cc: Messrs. Stern, Pineault and Ms's Chaitowitz and Young]

United States Court of Appeals

For the First Circuit

No. 02-2289

UNITED STATES,

Appellee,

v.

DAVID G. STERN,

Defendant, Appellant.

Before

Boudin, *Chief Judge*,
Lipez and Howard, *Circuit Judges*.

ORDER OF COURT

Entered: August 16, 2004

The motions to recall mandate and to reconsider application for bail are *denied*. We are not persuaded that our decision was "demonstrably wrong," *Legate* v. *Maloney*, 348 F.2d 164, 166 (1st Cir. 1965), in light of *Blakely* v. *Washington*, 124 S.Ct. 2531 (2004); and in any event the appellant may petition the Supreme Court for a writ of certiorari. Even assuming that the Supreme Court invalidates the Federal Guidelines in a pending case, the appellant has not shown that he is "likely to [obtain] . . . a

reduced sentence . . . less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1)(B)(iv).

By the Court:
Richard Cushing Donovan, Clerk

By:_____
Chief Deputy Clerk

[cc: Messrs: Stern, Pineault, Ms. Chaitowitz and Ms. Young]

United States District Court
District of Massachusetts

UNITED STATES OF AMERICA

v.

David G. Stern

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 01-10266-NG

Defendant's Attorney: Stephen Hrones

THE DEFENDANT:

___pleaded guilty to count(s):_____

___pleaded nolo contendere to counts(s)_____which was accepted by the court.

__XX__ was **found guilty** on count(s) **1-14, 16, 17 & 18** after a plea of not guilty.

Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC § 1341	Mail Fraud	2/98	1-14, 16
18 USC § 1343	Wire Fraud	2/98	17, 18

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

XX The defendant has been found **not guilty** on count **15** and is discharged as to such count(s).

IT IS ORDERED that the defendant shall pay a special assessment of **$1,700 (total)** for counts **1-14, 16, 17 & 18** which shall be due immediately.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.:000/00/6605

Defendant's Date of Birth: 0/0/1946

Defendant's USM No.: 23799-038

Defendant's Residence Address:24 Elm St.
Newport, RI 02840

Defendant's Mailing Address: Same as above

9/25/02
Date of Imposition of Judgment

/s/ Nancy Gertner
Signature of Judicial Officer

Nancy Gertner U.S.D.J.
Name and Title of Judicial Officer

10/1/02
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a

total term of **30 MONTHS ON COUNTS 1-14, 16, 17 & 18 ALL TO BE SERVED CONCURRENTLY WITH EACH OTHER.**

___The court makes the following recommendations to the Bureau of Prisons:

___The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ___ on _____

☐ as notified by the United States Marshal

XX The defendant shall self surrender for service of sentence at the institution designated by the Bureau of Prisons before 2:00 p.m. on NOVEMBER 1, 2002.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on ___ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By:

_____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 YEARS**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

*For offenses committed on or **after** September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable.)

☒ The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set

forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated) **XX See special conditions page 3.01**

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependants and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISED RELEASE
(check all that apply)

XX The defendant is prohibited from ***possessing a firearm*** or other dangerous weapon.

XX The defendant ***shall not*** represent himself as a financial advisor or invest money for other people.

___The defendant is to pay the balance of the ***fine*** according to a court ordered repayment schedule.

___The defendant is prohibited from ***incurring new credit*** charges or opening additional line soft credit without the approval of the probation officer unless the defendant is in compliance with the payment schedule.

___The defendant is to provide the probation officer access to any requested ***financial information.***

___The defendant is to serve ___ months in ***home detention,*** ***(either)*** with electronic monitoring and pay a fee of $4.97 for each day under electronic monitoring.

___The defendant is to reside for a period of ___ months in a ***community corrections center*** and shall observe the rules of that facility.

___The defendant is ***true name and will be prohibited from the use of any aliases***, false dates of birth, false social security numbers, incorrect places of birth, and any other pertinent incorrect identifying information.

___The defendant is to participate in a program for ***substance abuse*** as directed by the United States Probation Office, which program may include testing to determine whether the defendant has reverted to the use of alcohol or drugs. The defendant shall be required to contribute to the costs of services for such treatment based on the ability to pay or availability of third party payment.

___The defendant is to participate in a ***mental health*** program as directed by the United States Probation Office.

___If ordered ***deported***, the defendant is to leave the United States and is not to return without prior permission of the United States Attorney General.

___The defendant is to complete ___ hours of ***community service*** at an agency approved by the probation officer.

___The defendant is to meet with the ***Internal Revenue Service*** within the first ___ days of the period of supervision in order to determine the prior tax liability and is to file tax returns and pay any future taxes due.

STATEMENT OF REASONS

XX The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report, except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: **19**

Criminal History: **1**

Imprisonment Range: **30 TO 37 months**

Supervised Release Range: **2 TO 3 YEARS**

Fine Range: **$6,000 to $60,000**

XX Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: **N/A**

☐ Discretionary restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(a)(B)(ii) (or in

offenses committed before April 23, 1996, pursuant to 18 U.S.C. § 3663(d)).

☐ Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because the number of identifiable victims is so large as to make restitution impracticable, pursuant to 18 U.S.C. § 3663A(c)(3)(A).

XX The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

___ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of a defendant's substantial assistance, or

___ for the following specific reason(s):

_____

United States Court of Appeals
For the First Circuit

No. 02-2289

UNITED STATES,

Appellee,

v.

DAVID G. STERN,

Defendant, Appellant.

Before

Boudin, *Chief Judge*,
Torruella, Selya, Lynch, Lipez and
Howard, *Circuit Judges*.

ORDER OF COURT

Entered: April 22, 2004

The petition for panel rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is

ordered that the petition for rehearing and petition for rehearing en banc be *denied*.

By the Court:
Richard Cushing Donovan, Clerk

By: MARK R. SYSKA
Chief Deputy Clerk.

[cc: Messrs. Stern, Pineault, Ms's Chaitowitz and Young]

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

July 7, 2004

Mr. David Stern
Prisoner ID 23799-038 Unit I
P.O. Box 879
Ayer, MA 01432

Re: David G. Stern
v. United States
Application No. 04A17

Dear Mr. Stern:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on July 7, 2004 extended the time to and including September 19, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ [Illegible]
Sandy Spagnolo
Case Analyst

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	Docket No. 01-10266
	)	Defendant No. 01
vs.	)	
David G. Stern	)	

PRESENTENCE REPORT

Prepared for: The Honorable Nancy Gertner, U.S. District Judge

Prepared by: Emily S. Piovoso, U.S. Probation Officer (508) 929-9933

Reviewed by: Thomas F. Merigan, Jr., Supervising U.S. Probation Officer (413) 785-0255

Sentencing Date: 06/25/02 Office Location: Worcester

Offense: Found Guilty

CTS	Title & Section	Charges	Date Offense Concluded

See next page.

Counts to be Dismissed: None

Date of Arrest: 7/23/01 Custodial Status: Released on $25,000 Bond on 7/23/01

Date of Birth: 08/12/46 Age: 56
Citizenship: U.S. Sex: Male
SSN: 396-42-6605 Race: White
Education: Post-Graduate U.S. Marshal No.: 23799-038

Dependents: 2
FBI No.: None
Other ID No.:

Residence Address: 24 Elm Street, Newport, RI 02840

Mailing Address: Same as above

Detainers: None

Codefendants: None

Assistant U.S. Attorney	Defense Counsel (RETAINED)
Michael J. Pineault, Esq.	Stephen Hrones, Esq.
(617) 748-3100	Hrones & Garrity 232 Lewis Wharf Boston, MA 02110 (617) 227-4019

Date report prepared: 8/19/02 Mandatory Minimum

Revised:

* * *

Offense Level Computation

(39) The Guideline Sentencing Range has been calculated by using the guidelines in effect at the time of the commission of the instant offense, that is, the guidelines contained in the Guideline Manual issued 11/1/97.

(40) **Base Offense Level:** The guideline for these 18 U.S.C. 1341 and 1343 offenses is 2F1.1(a), which provides a base offense level of 6. 6

(41) **Specific Offense Characteristics:** Since the loss totaled $450,000, the offense level is increased by 9 levels, per Guideline 2F1.1(b)(1)(J). 9

(42) The offense involved more than minimal planning. Per Guideline 2F1.1(b)(2)(A), the offense level is increased by 2 levels. 2

(43) **Adjustment for Role in the Offense:** The defendant, who was the victim's attorney, abused his position of trust which significantly facilitated the commission of the offense. As a result, the offense level is increased by 2 levels per Guideline 3B1.3. 2

(44) **Victim Related Adjustment:** None. 0

(45) **Adjustment for Obstruction of Justice:** None. 0

(46) **Adjusted Offense Level (subtotal):** 19

(47) **Adjustment for Acceptance of Responsibility:** -0

(48) **Total Offense Level:** 19

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	Criminal No. 01-10266-NG
v.	April 4, 2002
DAVID STERN	Boston, Massachusetts

FOURTH DAY OF TRIAL
TRANSCRIPT OF THE EVIDENCE
BEFORE HONORABLE NANCY GERTNER,
UNITED STATES DISTRICT JUDGE,
AND A JURY

APPEARANCES:

For the Government:
Michael J. Pineault
Assistant United States Attorney
Office of the U.S. Attorney
John J. Moakley U.S. Courthouse
1 Courthouse Way, Suite 9200
Boston, Massachusetts 02210

For the Defendant:
Stephen B. Hrones, Esq.
Hrones & Harwood
Lewis Wharf – Bay 232
Boston, MA 02110

Court Reporter:
Harold M. Hagopian, RDR, CRR
John J. Moakley U.S. Courthouse
1 Courthouse Way, Suite 3204
Boston, MA 02210
Telephone: (617) 946-0900

* * *

[250] Counsel?

SIDEBAR CONFERENCE:

MR. HRONES: Your Honor, it just struck me that I should make an *Apprendi* objection now, because the loss, if he's convicted, it's going to be a question of amount of loss.

THE COURT: Right.

MR. HRONES: That's a jury question under *Apprendi*.

THE COURT: Uh-huh.

MR. HRONES: And as to basic offenses like six months, but it can be kicked up to years in prison based on loss. So it's my position that the jury should be – has to determine loss in this case.

THE COURT: Mr. Pineault?

MR. HRONES: I'd also object to the fact that they don't have the loss amount in the indictment. In other words, because he didn't indict on that, the most – I mean, the loss cannot figure into the sentence in any way, so the maximum he can get is six months.

MR. PINEAULT: I disagree, your Honor. The loss computation is to be performed pursuant to the sentencing guidelines by the Court, and I don't have the indictment right in front of me, but it does allege with particularity each of the frauds, the BayBank fraud and the gold.

THE COURT: And the verdict slip will – if they – check off a particular count, since it's a particular [251] check, to some degree, would wind up with loss in any event.

MR. HRONES: That's not the loss, though, that's the amount he paid in interest.

THE COURT: Right.

MR. HRONES: So the verdict slip doesn't determine the amount of loss.

MR. PINEAULT: But the – I mean, the verdict they return on a particular count will indicate whether they found a particular fraud scheme has been established beyond a reasonable doubt and the loss flows from that.

MR. HRONES: But it doesn't because he just told –

THE COURT: I know you're trying to put it on the record, but I will give you an opportunity, if you think the jury slip should have loss on it, I'll give you an opportunity to put that on the jury slip.

MR. HRONES: Oh, you will?

THE COURT: Yes.

MR. HRONES: Fine. Then – then I want that on the jury slip.

THE COURT: Okay. Does the government have an objection to that?

MR. PINEAULT: I don't – I haven't researched, your Honor. I'm not sure whether that would simply be advisory at that point.

THE COURT: Right.

[252] MR. PINEAULT: I don't see any harm in putting it down, and we can research later whether it's simply advisory or not.

THE COURT: So, what we would do is we would say – well, I just came up with this.

MR. HRONES: As the last question.

THE COURT: Total amount of loss, did you, in fact include testimony of the total amount?

MR. PINEAULT: Your Honor, I don't think we should go down this road.

THE COURT: I agree.

MR. PINEAULT: Because that may get into the issue of how you define a loss.

THE COURT: And how you define payment.

Okay, we'll leave it as it is. Anything else, Mr. Hrones?

MR. HRONES: No, your Honor.

MR. PINEAULT: Nothing from the government, your Honor.

THE COURT: Okay.

END OF SIDEBAR CONFERENCE:

THE COURT: There was nothing further, ladies and gentlemen. At this point you can take your notes, and all rise for the jury.

(The jury retired to deliberate at 11:15 a.m.)

* * *

UNITED STATED COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v. Docket No. 02-2289

DAVIG G. STERN,
Defendant-Appellant

MOTION TO RECALL MANDATE

NOW COMES the Defendant-Appellant, David G. Stern, and moves that this Honorable Court recall its Mandate dated April 29, 2004; vacate its Order dated April 22, 2004 (denying Stern's Petition for Rehearing and En Banc Determination); vacate its Judgment dated February 19, 2004; and remand this case to the District Court (Gertner, J.) with instructions to enter a new Judgment of Conviction in accordance with the Supreme Court's holding in *Blakely v. Washington*, 542 US ___ (2004), and herein sets forth the following reasons therefore:

1. Stern was charged in an indictment in the United States District Court for the District of Massachusetts on July 18, 2001, with sixteen (16) counts of mail fraud (18 U.S.C. §1341) and two (2) counts of wire fraud (18 U.S.C. §1343).

2. A jury trial was held on April 1-4, 2002 before the Honorable Nancy Gertner, United States District Judge.

3. Over Stern's objections, citing *Apprendi v. New Jersey*, 530 US 466 (2000), the Court refused to include on the jury verdict form the amount of the alleged loss.

4. Stern was found guilty of counts 1-14, 16, 17 and 18 but acquitted of count 15.

5. On September 25, 2002, Stern was sentenced by the Court to a term of imprisonment of thirty (30) months, plus three (3) years supervised release.

6. Stern was neither fined nor ordered to pay restitution since he had previously paid any and all amounts in question back to the alleged victim ove [sic] 2 1/2 [years] **before** the issuance of the criminal indictment.

7. In calculating Stern's sentence, the Court enhanced the base offense level of six (6) points by: two (2) points for minimal planning (not charged in the indictment nor found by the jury); two (2) points for fiduciary relationship (not charged in the indictment nor found by the jury); and nine (9) points for a 'loss' of $450,000 (not charged in the indictment not [sic] found by the jury).

8. The result of the so called enhancements was to increase Stern's sentence from a range of 0-6 months to a range of 30-37 months, plus the corresponding increase in supervised release. On October 1, 2002 a Judgment of Conviction entered.

9. On October 1, 2002, Stern filed a timely Notice of Appeal in the First Circuit Court of Appeals.

10. On January 6, 2003, Stern self-surrendered to the Federal Medical Center-Devens, Ayer, Massachusetts, where he remains incarcerated.

11. On February 19, 2004, this Court entered a Judgment affirming the Judgment of Conviction saying in relevant part:

> "Stern acknowledges that this court has already rejected his argument invoking *Apprendi v. New Jersey* (citation omitted). '*Apprendi* simply does not apply to guideline findings that increase the defendant's sentence, but do not elevate the sentence to a point beyond the applicable statutory maximum.' *United States v. Caba* (citation omitted) 'Nothing in *Apprendi* or [other] cases' – including *Ring v. Arizona*, the grant of certiorari in *Blakely v. Washington* and the *United States v. R.L.C.* (citations omitted), the trio of cases cited by Stern – 'calls into question the validity of the Sentencing Guidelines.' *United States v. Goodine* (citation omitted). For the present we have no reason to think that *Apprendi* will be applied to the federal guidelines."

12. On March 25, 2004, Stern filed a Petition for Panel Rehearing and for En Banc Determination, which was denied on April 22, 2004. Stern's Petition for Writ of Certiorari is presently due on July 22, 2004.

13. On June 24, 2004, the Supreme Court of the United States rendered its decision in *Blakely v. Washington*, 542 US ___ (2004).

14. The impact of Blakely upon Stern's conviction and sentence is as obvious as it is significant.

15. The Court held that any fact that increases the upper range of a judge's sentencing discretion is an element of the offense. Further, that facts which had historically been taken into account by judges at sentencing to assess the sentence within the range of punishment, such as drug quantity, money amounts, role in the offense – must now be charged in the indictment and submitted to the jury.

16. Committing the Court to *Apprendi v. New Jersey*, 530 US 466 (2000), Justice Scalia, writing for the majority finds that "[o]ur precedents make clear, however, that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict*." (Court's emphasis) *Blakely*, slip opinion at page 7.

17. "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict [sic] alone does not allow, the jury has not found the facts . . . and the judge exceeds his authority." *Blakely*, slip opinion at page 7.

18. Even the dissenters in *Blakely* acknowledge that "under the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense." *Blakely*, O'Connor, dissenting, slip opinion at page 5.

19. Stern also asserts that *Blakely* "casts Constitutional doubt over" the validity of his conviction in as much as the indictment failed to include essential elements of the crime for which he was charged. *Blakely*, O'Connor, dissenting, slip opinion page 11. See *United States v. Cruikshank*, 92 US 542 (1876), *In Re Winship*, 397 US 358 (1970) and *United States v. Gaudin*, 515 US 506 (1995).

20. The power to recall a mandate is unquestioned. See generally Wright, Miller, Cooper and Gressman, Federal Practice and Procedure §3938 (1977). The power "apparently originated in the inherent power of all federal courts to set aside any judgment during the term of court at

which it was entered." *Sargeant v. Columbia Forest Products, Inc.*, 75 F3d 62, 63 (7th Cir. 1995).

21. The authority of a court to recall its mandate enanates [sic] from its inherent power to prevent injustice. *Dilley v. Alexander*, 627 F2d 407, 410 (D.C. Cir. 1980).

22. The grounds that justify recall of a court's mandate range from the most severe, such as fraud upon the court, to the more mundane such as correction of a clerical mistake. A recall of the mandate should be based upon "exceptional circumstances." *Hines v. Royal Indemnity Co.*, 253 F.2d 111, 114 (6th Cir. 1958). Also see *Johnson v. Bechtel Professional Associates Corp.*, 801 F2d 412, 416 (D.C. Cir. 1986); *Patterson v. Crabb*, 904 F.2d 1179, 1180 (7th Cir. 1990), *Dunton v. County of Suffolk, State of New York*, 748 F2d 69, 70 (2d Cir. 1984).

23. Recall of a mandate can also be based on "special reason." *Greater Boston Television v. F.C.C.*, 463 F2d 268, 278 (D.C. Cir. 1971). Also see *United States v. Hubbard*, 686 F2d 955, 956 (D.C. Cir. 1982).

24. A supervening change in the governing law that calls into serious question the correctness of the court's judgment may justify the recall of the mandate. *McGeshick v. Ghoucair*, 72 F3d 62, 63 (7th Cir. 1995).

25. A subsequent decision of the Supreme Court calling into question the correctness of the court's judgment has been held to justify the recall of a mandate. *Zipfel v. Halliburton Co.*, 861 F2d 565 (9th Cir. 1988).

26. Court's [sic] have the inherent power to recall a mandate and issue a stay in order to protect the integrity of the judicial process. *United States v. Holland*, 1 F3d 454, 455 (7th Cir. 1993).

27. This Court has the power to recall the mandate. The fact that the rationale for affirming the District Court's Judgment of Conviction has been contravened by the Supreme Court, undermines the correctness of this Court's Judgment. In affirming its commitment to *Apprendi*, the Court held that the "right [to a jury trial] is no mere procedural formality, but a fundamental reservation of power in our Constitutional structure." *Blakely*, slip opinion at page 9.

28. The holding in *Blakely* clearly nullifies the effect of the Court's reliance upon *United States v. Caba* since the issue is not simply one of applying *Apprendi* to increases in a sentence that may be imposed but rather a much more fundamental protection of the sixth amendment right to a jury trial. The *Caba* interpretation of *Apprendi* is no longer correct.

29. The holding in *Blakely* as applied to the instant case certainly raises the question of the correctness of this Court's Judgment of February 19, 2004, and in order to prevent a clear injustice from continuing, this Court is called upon to act swiftly and recall the mandate and direct Stern's immediate release.

30. Stern's liberty interests are at stake – nothing more . . . nothing less.

31. There should be no doubt that this Court or the District Court in the event of a remand in light of the holding in *Blakely* is required to review both Stern's conviction and sentence forthwith.

WHEREFORE, Defendant-Appellant, David G. Stern, respectfully prays that thid [sic] Honorable Court:

A. Forthwith recall the mandate dated April 29, 2004;

B. Vacate its Order dated April 22, 2004 denying Stern's Petition for Rehearing and En Banc Determination;

C. Vacate it [sic] Judgment dated February 19, 2004 and either:

1. Rehear Stern's Appeal; or

2. Remand the case to the District Court (Gertner, J.) with instructions to enter a new Judgment of Conviction in accordance with the Supreme Court's Holding in *Blakely v. Washington*, 542 US ___ (2004).

D. For whatever further relief this Court deems meet and just.

Respectfully submitted,

_____

David G. Stern
23799-038
Federal Medical Center-Devens
P.O. Box 879
Ayer, MA 01432

Dated: July 6, 2004

CERTIFICATE OF SERVICE

I, David G. Stern, hereby certify that on July 6, 2004, I placed the within Motion to Recall Mandate, in the mail box located at the Federal Medical Center-Devens, Ayer, Massachusetts, in an envelope sent first-class mail with

postage prepaid to Michael J. Pineault, AUSA, District of Massachusetts, 1 Courthouse Way, Boston, MA 02210.

David G. Stern

Dated: July 6, 2004

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

02-2289

UNITED STATES,
Appellee

v.

DAVID G. STERN,
Appellant

MOTION TO RECONSIDER ORDER OF COURT
DATED AUGUST 16, 2004

Now comes the Defendant-Appellant, David G. Stern, and respectfully moves that this Honorable Court reconsider its Order dated August 16, 2004 and herein sets forth the following reasons:

1. On February 19, 2004, this Honorable Court affirmed the Judgment of the District Court (Gertner, J.) saying:

> "Stern acknowledges that this courthas [sic] already rejected his argument invoking *Apprendi v. New Jersey* (citation omitted). "*Apprendi* simply does not apply to guideline findings **that increase the defendant's sentence, but do not elevate the sentence to a point beyond the lowest applicable stautory** [sic] **maximum**" *United States v. Caba* (citation omitted) (emphasis added).

2. Despite the fact that the Court has stated that it is not persuaded that its decision is "demonstrably wrong", Stern reasserts that the Court's reliance upon *Caba*, in

light of *Blakely v. Washington* (citation omitted) cannot be construed any other way. The Court held that " . . . the relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose **without** any additional findings." *Blakely*, slip opionion [sic] at page 7.

3. While it is true that Stern can petition the Supreme Court for a Writ of Certiorari, he should not be required to do so in light of the clear language of *Blakely* and the overwhelming number of post *Blakely* decisions sustaining Stern's position.[1]

4. The Order of August 16, 2004 goes on to say that "[e]ven assuming the Supreme court invalidates the Federal Guidelines in a pending case . . . " Clearly, the Court has misconstrued Stern's argument which is not that the Federal Guidelines are invalid or unconstitutional, but rather the Supreme Court and the sixth amendment requires that they be applied constitutionally.

5. It is unclear whether this Court still clings to its previously stated position set forth in its Order of February 19, 2004 that "[f]or the present we have no reasons to think that *Apprendi* will be applied to the federal guidelines", but Stern suggests that there can be little doubt that the 6th amendment applies to **any** guideline system.

6. Stern's sentence was enhanced by a total of thirteen (13) points by factors or elements for which he

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[1] *United States v. Ameline*, 9th Circuit; *United States v. Booker*, 7th Circuit; *United States v. Mooney*, 8th Circuit; *United States v. Montgomery* 6th Circuit; and at least a dozen district court decisions of which Stern is aware. Only the 5th Circuit (*United States v. Pineiro*) holds that *Blakely* does not apply to USSG.

was not charged, and which were neither submitted to the jury nor found beyond a reasonable doubt. The result increased his sentencing range from 0-6 to 30-37 months, in contravention of the principles set forth in *Apprendi* as articulated in *Blakely*. To suggest that Stern has not shown that he is "likely to [obtain] . . . a reduced sentence . . . less than the total of the time already served . . . " is simply inconsistent with those liberty rights afforded by the Consitution [sic] to Stern. He has served over nineteen months of a thirty month sentence and to suggest that it is unlikely he will be granted **any** relief which will reduce his sentence to "time served" requires the Court to ignore the present post *Blakely* landscape.

7. While Stern intends to file a Petition for a Writ of Certiorari, before it is even remotely possible that his matter will be resolved by the Supreme Court, he will have served his entire sentence, making a mockery of the true concept of bail.

WHEREFORE, the Defendant-Appellant, David G. Stern, prays that this Honorable Court reconsider its Order of August 16, 2004, and Recall the Mandate and release Stern on bail and for whatever relief this Court deems meet and just.

Respectfully submitted,

_____

David G. Stern
23799-038
Federal Medical Center-Devens
P.O. Box 879
Ayer, MA 01432

August 18, 2004

CERTIFICATE OF SERVICE

I, David G. Stern, did this day, mail a copy of the within Motion for Reconsideration, postage pre-paid, first class mail, to Michael Pineault, Assistant United States Attorney, 1 Courthouse Way, Boston, MA 02210.

July 19, 2004

David G. Stern

(2)

Supreme Court, U.S.
FILED
SEP 2 4 2004
OFFICE OF THE CLERK

No. 04-385

In the Supreme Court of the United States

DAVID G. STERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the Supreme Court of the United States

No. 04-385

DAVID G. STERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). This Court has granted certiorari in *United States* v. *Booker*, No. 04-104 (Aug. 2, 2004), and *United States* v. *Fanfan*, No. 04-105 (Aug. 2, 2004), to consider whether *Blakely* applies to the federal Sentencing Guidelines, and, if so, how federal sentencing should be conducted in light of such a conclusion. If the Court were to hold that *Blakely* applies to the Guidelines, the proper disposition of petitioner's claim could be affected by such a holding (as well as by any applicable doctrines of waiver, forfeiture, and harmless error). Accordingly, the petition for a writ of certiorari should be held pending this Court's decisions in *Booker*

and *Fanfan*, and then disposed of as appropriate in light of the decisions in those cases.*

PAUL D. CLEMENT
Acting Solicitor General

SEPTEMBER 2004

* The government waives any further response to the petition unless this Court requests otherwise.